IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1610

CECIL PENDLETON, ... APPELLANT

VS:

BEE PENDLETON,
CALLIE SHERROW PENNINGTON,
JACK PENDLETON,
W. G. PENDLETON,
MARATHON OIL COMPANY,
CARROLL G. COLE,
I. W. SMITH, and
QUALI CON, INC., ... APPELLEES

ON APPEAL FROM THE SUPREME COURT
OF THE COMMONWEALTH OF KENTUCKY

MOTION AND RESPONSE TO JURISDICTIONAL STATEMENT

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MOTION

Comes Edward P. Roark, Attorney for Jack Pendleton on this Appeal (and who was also attorney for Bee Pendleton, now deceased, in the Supreme Court of Kentucky) and in response to Appellant's Jurisdictional Statement moves the Court under Supreme Court Rules, Rule 16, to

dismiss the appeal herein, or in the alternative, to affirm the decision of the Supreme Court of Kentucky, and in support of this motion he asserts and relies on the following grounds:

I. THE FEDERAL QUESTION SOUGHT TO BE REVIEWED ON THIS APPEAL WAS NOT PROPERLY RAISED, OR EXPRESSLY PASSED ON IN THE LOWER COURT.

II. THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

III. TWO OF THE APPELLEES NAMED ARE DECEASED AND NO ACTION HAS BEEN TAKEN BY APPELLANT TO REVIVE THE ACTION AGAINST THEIR REPRESENTATIVES OR HEIRS, SO THE APPELLEES NAMED ARE NOT THE REAL PARTIES IN INTEREST.

ARGUMENT

In support of the grounds listed, Appellee submits the following argument:

I. THE FEDERAL QUESTION SOUGHT TO BE REVIEWED ON THIS APPEAL WAS NOT PROPERLY RAISED, OR EXPRESSLY PASSED ON IN THE LOWER COURT.

Appellant, in his attack on the constitutional validity of KRS 392.090(2) under the 14th Amendment to the Constitution assumes the position that if he procures a ruling that KRS

391.090(2) is unconstitutional and is invalidated he will then be entitled to the estate of his putative father under the provisions of KRS 391.010(1) even though he admittedly remains illegitimate. Such a position is untenable. He obviously overlooks the existing statutory and case law of Kentucky pertaining to inheritance by bastards.

Appellant has not attacked the validity of KRS 391.010(1), the Kentucky Descent and Distribution Statute. The pertinent part of KRS 391.010(1) reads:

> "When a person having right or title to any real estate of inheritance dies intestate as to such estate, it shall descend in common to his kindred, male and female, in the following order, except as otherwise provided in this chapter:
>
> (1) To his children and their descendants; if there are none, then - - -."

The Courts of Kentucky have consistently decided, KRS 391.090(2) notwithstanding, that under KRS 392.010(1) an illegitimate child has no right of inheritance in his father's estate. See *Croan* vs. *Phelps,* 94 Ky. 213, 21 SW 874; *Kimmel* vs. *Williams,* 217 Ky. 671, 290 SW 483; *Todd* vs. *Bowman,* 285 Ky. 117, 147 SW 2d 75.

The prevailing rule of construction for intestate succession by an illegitimate child is stated in 10 Am. Jur. 2d, Bastards, Sect. 149, wherein it states:

"Statutes which provide generally for the distribution of intestate property of a deceased person among certain classes of persons *without mentioning illegitimates, are construed to refer to legitimates only,* unless there is something in the language of the particular statute which indicates a different intention on the part of the legislature. The term *"child," "children"* and the like *in such statutes are ordinarily construed to mean legitimate child or children only,* unless other statutory language clearly imports the legislative intention to include such persons."

It would appear, therefore, that even if KRS 391.090(2) is declared unconstitutional and is thereby invalidated, Appellant would have no claim to legitimacy or a right of inheritance under KRS 391.020(1). Having made no attack on the constitutional validity of KRS 391.020(1) he has asserted no right under existing construction of the statute to the decedent's estate. Having stated no enforceable cause of action, his right of recovery was not properly raised or expressly passed on in the lower Court, and his appeal should be dismissed on this ground.

II. THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

This Court is on familiar grounds in dealing with the question of the constitutional validity of a state statute relative to the inheritance of intestate

property by an illegitimate child. In the case of *Labine* vs. *Vincent,* 401 U.S. 532, 28 L. Ed 2d 288, 91 S. Ct. 1017, decided as recently as 1971, (which is 5 years after the death of Cornelius Pendleton) this Court upheld the constitutionality of a Louisiana statute which provides that an illegitimate child who had been acknowledged by the father could not inherit from the father in the case of intestacy where there are other heirs.

In commenting on the law regarding the rights of illegitimate children in Louisiana, the Court reasoned,

"These rules for intestate succession may or may not reflect the intent of particular parents. Many will think that it is unfortunate that the rules are so rigid. Others will think differently. But the choices reflected by the intestate succession statute are choices which it is within the power of the state to make. The Federal Constitution does not give this Court the power to overturn the state's choice because the Justices of this Court believe they can provide better rules. Of course, it may be said that the rules adopted by the Louisiana Legislature "discriminate" against illegitimates. But the rules also discriminate against collateral relations as opposed to ascendants, and against ascendants as opposed to descendants. - - - But the power to make rules to establish, protect, and strengthen the family life as well as to regulate the disposition of property left in Louisiana by a man dying there

> is committed by the Constitution of the United States and the people of Louisiana to the legislature of that state. Absent a specific constitutional guarantee, it is for that legislature, not life-tenured judges of this Court, to select from among possible laws."

The highest Court of Kentucky, considering the claim of an illegitimate child to inherit from his putative father and his raising the issue of the constitutionality of the descent and distribution statute of Kentucky in the case of *Richardson's Adm'r.* vs. *Borders,* 246 Ky. 303, 54 SW2d 676, held substantially the same in the *Labine* case by deciding,

> "The right to take property, either real or personal, by inheritance, is one created by law, and the Legislature, in the absence of constitutional limitations, has absolute power to say who shall inherit. Those named as heirs and distributees in the existing laws of descent and distribution have no vested rights until the intestate's death, and, as to them it necessarily follows that the Legislature may at will change the law governing the manner in which property shall descend and be distributed without affecting vested rights."

It is submitted by Appellees that the reasons for the decisions made in the *Labine* case are just as valid and controlling today as when rendered, so it appears that the appeal does not present a

substantial federal question that has not been recently considered.

III. TWO OF THE APPELLEES NAMED ARE DECEASED AND NO ACTION HAS BEEN TAKEN BY APPELLANT TO REVIVE THE ACTION AGAINST THEIR REPRESENTATIVES OR HEIRS, SO THE APPELLEES NAMED ARE NOT THE REAL PARTIES IN INTEREST.

By affidavit of counsel filed in the appendix as an exhibit hereto, it will be seen that two of the three heirs of Cornelius Pendleton, namely Callie Sherrow Pennington and Bee Pendleton are now deceased. They have been dead for more than six months, their estates have been settled and their executors have been discharged.

Inasmuch as both named parties have been deceased for more than six months, an Order should be entered declaring that this action is abated as to them under Supreme Court Rule 48.

Wherefore, Appellee, Jack Pendleton, respectfully asks this Court to dismiss the appeal, or, in the alternative, to affirm the decision of the Supreme Court of Kentucky.

Respectfully submitted,

EDWARD P. ROARK
207 Stanford Street
Lancaster, Kentucky 40444

Attorney for Jack Pendleton, Appellee

APPENDIX

APPENDIX

AFFIDAVIT OF EDWARD P. ROARK

Comes Edward P. Roark, being duly sworn, and states that he represented Bee Pendleton in the Court of Appeals of Kentucky (now Supreme Court of Kentucky) on the appeal of Cecil Pendleton, in action No. F-313-72, and he knew, also, Callie Sherrow Pennington; that Callie Sherrow Pennington died on January 3, 1970, and Bee Pendleton died on June 5, 1975; that the estates of both parties have been settled, a distribution of their assets been had, and the executors for both estates have been discharged.

Witness my signature this May 12, 1976.

Edward P. Roark

EDWARD P. ROARK

Subscribed and sworn to before me by Edward P. Roark, this May 12 1976.

Homer L. Pruitt
NOTARY PUBLIC

My commission expires 2-6-79.